

STATE OF MICHIGAN
COURT OF APPEALS

ARTHUR ROMENCE, ROBERT NIEMIEC,
MARTIN McENROE, DOUGLAS BART,
LARRY SHARP, HANS BORLINGHAUS,
MARY FREDRICKS, JOHN FURTON, and
DIANNA LUMAN,

UNPUBLISHED
April 28, 2005

Plaintiffs-Appellants/Cross-
Appellees,

v

JOHN CARRIER, JAMES SUMNERS,
DAVID SAVAGE, and DAVID COLLINS,

No. 253713
Kent Circuit Court
LC No. 03-006167-CB

Defendants-Appellees/Cross-
Appellants.

Before: Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right, and defendants cross-appeal, from an order granting summary disposition in plaintiffs' favor in this shareholder dispute concerning a stock sale in a privately-owned corporation. Plaintiffs seek to change the remedy ordered by the trial court from rescission to specific performance, permitting them to purchase their proportionate share of the stock. Defendants seek reinstatement of the stock sale. We affirm.

I

Plaintiffs and defendants are shareholders in Excellence Manufacturing, Inc. ("Excellence"). Plaintiffs owned thirty percent of the shares of stock of Excellence, and defendants owned nineteen percent of the shares. Karol Ervins-Houtman, who is not a party to this lawsuit, owned the remaining fifty-one percent of the shares of stock.

On May 30, 2003, defendants, who comprised the board of directors of Excellence, entered into an agreement with Ervins-Houtman to purchase her shares of stock. Although the shareholder agreement and the corporate bylaws of Excellence in effect at the time required that any stock first be offered for sale to the corporation, and then to all shareholders in their proportionate shares, defendants individually purchased Ervins-Houtman's majority share without the requisite offer to all shareholders.

Plaintiffs filed this action to enforce their rights under the bylaws,¹ arguing that they were entitled to purchase their proportionate shares of Ervins-Houtman's stock.² Plaintiffs requested that the court impose a constructive trust on the shares of stock purchased by defendants.

Defendants filed a motion for summary disposition, claiming that the bylaws were amended on May 30, 2003 to remove the sale restrictions. Defendants argued that Article X of the bylaws provided that the bylaws may be amended by a majority vote of the board of directors, and the board had unanimously agreed to remove the transfer restrictions. Defendants' purchases therefore did not violate the bylaws. In response, plaintiffs requested that a cross-motion for summary disposition be granted in their favor.

The trial court found that, contrary to defendants' argument, the amendment to the bylaws was not effected until the summer of 2003, after the purported purchase of Ervins-Houtman's stock and after plaintiffs' action was filed. Accordingly, the sale was a nullity. The court granted summary disposition in favor of plaintiffs, invalidating the sale and returning the parties to their stock ownership status of as May 29, 2003.

II

Plaintiffs contend that the trial court abused its discretion in merely vacating the sale to defendants and returning the parties to the status quo ante rather than imposing a constructive trust on the disputed stock shares and transferring those shares to plaintiffs upon payment. We disagree.

A trial court has discretion in awarding damages, including the remedy of specific performance in the purchase of stock. *Livingston v Krown Chemical Mfg, Inc*, 50 Mich App 153, 156-157; 212 NW2d 775 (1973), aff'd 394 Mich 144; 229 NW2d 793 (1975). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). A trial court's grant or denial of summary disposition is reviewed de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003).

Plaintiffs argue that under Article VII, § 4, of the bylaws, which governs the sale of stock, the right of first refusal became an option contract because the condition precedent—defendants' receipt of an offer from Ervins-Houtman—was met, and thus the trial court lacked the discretion to forego ordering specific performance. Plaintiffs' argument is unpersuasive.

¹ The Shareholder Agreement provided that a shareholder could dispose of stock, without restriction, with the prior written consent of fifty-one percent of the shares entitled to vote. Ervins-Houtman executed the necessary written consent, and therefore plaintiffs' claim was limited to the bylaws restriction.

² Plaintiffs also claimed that defendants violated their fiduciary duty and that defendant's action constituted shareholder oppression. These claims are not an issue on appeal.

We find the cases cited by plaintiffs inapposite because they do not involve similar facts and equitable considerations. Here, unlike in other cases that have ordered specific performance of a right of first refusal, neither the sale of the stock nor the sale restrictions are inevitable occurrences. Under the right of first refusal in this case, Ervins-Houtman could elect to retain her shares and never sell to anyone. See *DeVries v Westgren*, 446 Pa 205, 208-209; 287 A2d 437 (1971) (stock purchase agreement technically not an option, but rather a right of first refusal because agreement did not create an irrevocable offer; however, unlike a right of first refusal, whereby shareholder could retain shares and not sell to anyone, agreement required the employee to offer his shares to remaining shareholders upon termination of his employment). Further, it was undisputed that the bylaws could be amended by a majority vote of the board of directors and, as the trial court noted, defendants could and did amend the bylaws to remove the sale restrictions; however, the amendment was ineffectual with regard to the sale at issue because the amendment postdated the sale. Plaintiffs were not entitled to an order for specific performance.

III

On cross-appeal, defendants argue that the court erred in denying their motion for summary disposition. Defendants contend that the trial court should have confirmed the validity of the sale of Ervins-Houtman's stock to defendants on the basis of defendants' actions to amend the bylaws and effect a valid sale by ratification or a corrective transfer of the stock. We disagree.

It is undisputed that defendants did not act to remove the stock transfer restrictions of Article VII, § 4, of the bylaws until long after the May 30, 2003 sale. The sale of Ervins-Houtman's stock to defendants on May 30, 2003 therefore violated the bylaws provisions for a right of first refusal. Defendants rely on various theories to rehabilitate the initial invalid sale of the stock and avoid a return to the status quo preceding the sale. However, given the facts and equitable considerations before us, we concur with the trial court that the proper remedy is invalidation of the sale.

We find the trial court's reasons for rejecting defendants' arguments sound. Defendants' expressed general intent on May 30, 2003, that "the substance of the contemplated Stock Purchase Agreement was in the best interests of Excellence Manufacturing" and that they "should take whatever action was necessary to effectuate and implement the Stock Purchase Agreement" with Ervins-Houtman, did not overcome the express provisions of the bylaws. Likewise, the ratification consent pursuant to MCL 450.1525 was merely "a confirmation of prior acts," and encompassed no action amending the bylaws. Defendants' subsequent attempt sometime after July 3, 2003, after this litigation commenced, to retroactively amend the bylaws by "unanimous written consent" did not remedy the invalidity of the May 30, 2003 sale, which was effected under the former bylaws that provided for a right of first refusal.

We are equally unpersuaded that defendants' further actions on December 8, 2003, following the trial court's ruling from the bench, entitled defendants to summary disposition. On December 8, 2003, the trial court ruled that the sale was invalid and the parties should be returned to the status quo. That same evening, defendants again sought to cure the invalid sale by obtaining Ervins-Houtman's signature on an amendment to the bylaws, as well as a corrective transfer of the stock. Even disregarding the factual issues raised by defendants' actions in

executing these documents,³ we conclude that the documents do not warrant altering the trial court's resolution of this dispute.

Defendants' last minute actions, in the interim between the court's bench ruling and the entry of the judgment, were more preemptive than curative—an attempt to avoid the effect of the pending judgment that would restore the parties to the status quo. The trial court's ruling on December 8, 2003, and its subsequent written order entered January 16, 2004 expressly determined that the parties were returned to the status quo preceding the sale, as of May 29, 2003. Despite defendants' technical arguments attempting to validate the December 2003 sale, the documents do not now entitle defendants to a different decision than that issued by the trial court.

Affirmed.

/s/ Janet T. Neff

/s/ Helene N. White

/s/ Michael J. Talbot

³ Plaintiffs obtained an affidavit from Ervins-Houtman in which she stated that defendant Carrier misrepresented the necessity of her signatures on the documents executed and had she known of the trial court's ruling, she would not have signed the documents presented by defendants on December 8, 2003.